No. 02-1198

MAR 17 2003

In the

# Supreme Court of the United States

KELLY BRINES, ET AL.,

*Petitioners*,

*v.*

XTRA CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondent XTRA Corporation is a wholly owned subsidiary of Berkshire Hathaway, Inc.

## LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

**Petitioners/Plaintiffs:**

Boguslaw Balenda, Robert Przybylo, Ronald Ellington, Guillermo Barboza, Marty Purtell, Timmie Hayes, Edward Borodzinski, Gilbert Quiroz, Kelly Brines, Manuel Bravo, Stanislaw Pylko, Dennis Bridges, Phillip Briski, Stanislaw Rocha, Gary Welch, David Corral, Ralph Sanek, Bryan Turley, Jozef Espinosa, Stanley Szczechowicz, Dan Graham, Fanciszek Fitt, Krzysztof Tumiel, Joel Compton, Boleslaw Giedrojc, Humberto Unzueta, Donald Barnhart, Michale Godette, Wladyslaw Zolink, David Crowe, Michael Griffin, Paul Caron, Richard Dew, Alex Harris, Bill Carrie, Terry Vollintine, Sr., Guillermo Jimenez, Ted Collins, Orville Gieseking, Kzaimierz Kochanek, Debbie Dentzman, Daniel Sauerwein, Ronald Kragulski, Shirley Flynn, Ivan Rogers, Amido Lezcano, Ron Semmerling, Jan Pawlica, Jose Lopez, Betty Vasquez, Rich Cervantez, Jorge Mariscal

**Respondent/Defendant:**

XTRA Corporation

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## STATEMENT OF THE CASE

Since 1993, Respondent XTRA Corporation's employee handbook has contained the following severance provision: "The Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force. In addressing issues related to layoffs, XTRA will review all situations and strive to take whatever action is necessary to ensure fairness in the treatment of employees." A18-19.[1] At the end of 1999, Respondent entered into an agreement with ContainerPort Group, Inc. ("ContainerPort"), whereby Respondent transferred certain operations at its facilities in Fairmont City and Chicago to ContainerPort. A21. A number of employees at those facilities, including Petitioner Kelly Brines, were terminated by Respondent and immediately employed by ContainerPort to continue performing their same jobs at their same work locations with comparable terms of employment. A21. The employees did not suffer any period of unemployment or loss of income as a result of the operations transfer. A21.

Petitioner Kelly Brines brought suit in state court against Respondent to recover severance benefits. R2. The Complaint asserts claims for breach of contract, violation of the Illinois Consumer Fraud Act, fraud, and violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et. seq.* ("ERISA"). R2. Respondent removed the case to the district court. R1.

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[1] Citations to "A__" are to the Appendix to the Petition for a Writ of Certiorari, and citations to "R__" are to the Record in the United States Court of Appeals for the Seventh Circuit.

Respondent moved to dismiss the complaint for failure to state a claim upon which relief may be granted. R3-4. On September 25, 2000, the district court dismissed the state law claims as preempted by ERISA, but denied Respondent's motion to dismiss the ERISA claim. A1.

Petitioner Brines thereafter moved to certify a class consisting of himself and 54 other former employees of XTRA who, like him, were terminated by Respondent and immediately hired by ContainerPort in connection with the operations transfer. R13-14. Over Respondent's opposition (R18), the district court certified Petitioner Brines' requested class. R31. Petitioner Brines and the class members are hereinafter referred to as "Petitioners."

Petitioners and Respondent filed motions for summary judgment as to Petitioners' ERISA claim. R63, 72. On October 9, 2001, the district court entered summary judgment in favor of Respondent and against Petitioners as to the ERISA claim, holding that Petitioners are not entitled to severance benefits. A4-12. The district court found that Respondent's 1993 Handbook is the ERISA plan at issue and that the severance provision in the 1993 Handbook is unambiguous and, thus, must be interpreted without resorting to extrinsic evidence. A9-10. The district court also found that the language in the severance provision "envisions discretion with respect to when the company will develop a separation program," yet determined that Petitioners are not entitled to severance benefits even if Respondent's decision not to pay severance benefits is reviewed de novo. A9. Specifically, the district court held that no reduction in force occurred in connection with the operations

transfer from Respondent to ContainerPort. A10-11. The district court concluded:

> No reduction in force occurs when an employer transfers its operations to another entity but immediately hires the former employees on comparable terms and the former employees are never unemployed as a result of the transfer. *See Allen v. Adage, Inc.*, 967 F.2d 695, 701-03 (1st Cir. 1992). Instead, "typically, reductions in force are permanent layoffs undertaken for budgetary or economic reasons." *Id.* at 702. Again, the undisputed evidence establishes that there was not a reduction in force, and Defendant is entitled to judgment as a matter of law.

A10-11.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. On September 10, 2002, the Seventh Circuit affirmed the summary judgment in favor of Respondent and against Petitioners. A27-34. The court held that Respondent was not obligated to pay severance benefits to Petitioners. The court observed:

> The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise. The statement in the plan that "The company will develop and implement an appropriate separation program" did not create a legally enforceable promise. Its vagueness alone would make it impossible for a court to provide any relief to the members of the class, who are

> seeking after all cash rather than the establishment of a program left to the employer's discretion to establish and define at some undetermined future time.

A28-29. The court concluded: "The normal understanding of severance pay (when not provided for in a written plan), as of bonuses, is that it is at the discretion of the employer; there is nothing here to upset that understanding." A34.

## SUMMARY OF THE ARGUMENT

The Court should deny the petition for a writ of certiorari. Supreme Court Rule 10 states that "only for compelling reasons" will a writ of certiorari be granted and sets forth such reasons. The petition does not set forth any of the reasons outlined in Rule 10 and fails to present any compelling reasons justifying a writ of certiorari.

The petition is an almost verbatim regurgitation of Petitioners' brief in the court of appeals, which, in turn, was an almost verbatim regurgitation of Petitioners' summary judgment memoranda in the district court. Indeed, the argument in the petition does not even correlate to the questions presented.

The petition presents eight questions. Reading those questions in a light most favorably to Petitioners, Petitioners, at best, claim that both the district court and the court of appeals made erroneous findings as to undisputed facts and misapplied rules of law that Petitioners do not claim were misstated. Rule 10 makes clear that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is not one of those rare cases

where a petition should be granted. As apparent from the questions, the questions are not of general importance but are unique to the facts of the present case.

Contrary to the first question presented, neither the district court nor the court of appeals applied an arbitrary and capricious standard of review to Respondent's decision not to pay severance benefits to Petitioners. The second, third, and fifth questions presented—which contend that the courts below misinterpreted the term "reduction in force" in the 1993 Handbook and failed to give proper consideration to certain alleged extrinsic evidence—are irrelevant because even if Petitioners were to prevail on those questions, they would still not be entitled to severance benefits under the court of appeals' decision. The court of appeals concluded: "The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise." A28.

Contrary to Petitioners' contention in the second and fifth questions presented that the courts below misinterpreted the term "reduction in force," the district court and the court of appeals both correctly concluded that a "reduction in force" means a layoff, which did not occur here. This conclusion has been uniformly reached by numerous other courts and Petitioners cite no authority to the contrary.

Plaintiffs' contention in the fourth and sixth questions presented that Respondent has an "ongoing severance benefit program" is simply false. The court of appeals correctly found that there is no such "program" and that Respondent's practice—which is to pay severance benefits to employees who, unlike

Petitioners, are laid off in a reduction in force if Respondent did not contract for comparable jobs for them at their current work locations—did not create a contractual obligation to pay severance benefits. A32-34.

Petitioners' seventh and eight questions presented are so lacking in merit that neither the district court nor the court of appeals even considered them. Contrary to Petitioners' contention in the seventh question presented, the "Apollo Memorandum" was never a written severance benefit plan, but, instead, pertained only to a proposed merger in 1998 that did not go forward. Petitioners' eighth contention—that the district court erroneously concluded that ERISA applied even though Petitioners are not entitled to benefits under the ERISA plan at issue—lacks any supporting legal authority.

In sum, Petitioners have not remotely come close to presenting a single question that warrants this Court's review. The Court, therefore, should deny the petition for a writ of certiorari.

## ARGUMENT

### I. Petitioners' contention that the district court erroneously applied an arbitrary and capricious standard of review is wrong and is not a sufficient ground for granting a writ of certiorari because neither the district court nor the court of appeals applied such a standard to Respondent's decision not to pay severance benefits to Petitioners.

The first question presented in the petition is: "Whether the district court erred in finding that Xtra's 1993 employee policy manual contained language giving Xtra's administrator discretion to determine eligibility for benefits and to construe provisions of the benefit plan so that an arbitrary and capricious standard of review would be utilized?" The district court, however, did not base its decision on any finding that Respondent's decision not to pay severance benefits to Petitioners should be reviewed under an arbitrary and capricious standard of review. Instead, the district court stated: "Ultimately, however, the Court finds that the same result is reached if the Court reviews XTRA's decision to not pay benefits under a *de novo* standard, and so it proceeds with the more stringent standard of review." A-9. The court of appeals likewise did not apply an arbitrary and capricious standard of review to Respondent's decision not to pay severance benefits to Petitioners. Thus, the first question presented in the petition was not the basis of the decisions below and is not a sufficient ground for granting a writ of certiorari.

**II. Petitioners' contention that the district court erroneously concluded that the term "reduction in force" does not mean "termination" is irrelevant and is not a sufficient ground for granting a writ of certiorari, but, in any event, the district court and the court of appeals' conclusion that a "reduction in force" means a layoff, which did not occur here, has been uniformly reached by numerous other courts.**

The second question presented in the petition is: "Whether the district court erred in finding the term 'reduction in force' (as used in Xtra's 1993 employee policy manual) did not mean 'termination' and thus, did not apply to the plaintiffs' terminations, although the district court's finding was in direct contradiction to both parties' statements that the term 'reduction in force' meant 'multiple terminations?'" At best, the alleged error consists of an erroneous factual finding. Under Rule 10, a petition for a writ of certiorari is rarely granted in such circumstances. As apparent from the question, the question is not of general importance but is unique to the facts of the present case. It is not a sufficient ground for granting a writ of certiorari.

Moreover, the alleged error is irrelevant. The court of appeals concluded: "The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise." A28. Even if Petitioners' contention that "reduction in force" means "multiple terminations" were correct, which it is not, Petitioners would still not be entitled to severance benefits because Respondent's

1993 Handbook does not promise severance pay to workers who were terminated.

In any event, the district court did not err. As it correctly observed, the severance provision in Respondent's 1993 Handbook "does not refer to termination. The plan only refers to a reduction in force, and there is no evidence that a reduction in force occurred." A10. The district court then proceeded to state the following rule of law:

> No reduction in force occurs when an employer transfers its operations to another entity but immediately hires the former employees on comparable terms and the former employees are never unemployed as a result of the transfer. *See Allen v. Adage, Inc.*, 967 F.2d 695, 701-03 (1st Cir. 1992). Instead, "typically, reductions in force are permanent layoffs undertaken for budgetary or economic reasons." *Id.* at 702.

A10-11. The court of appeals agreed with this statement of the law, observing that "reduction in force" "is a term used to describe a mass layoff, rather than the sale of a whole or part of a business." A28 (citations omitted). The district court and the court of appeals' conclusion of law is in complete harmony with other judicial decisions. *See Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983); *Pinto v. Zenith Radio Corp.*, 480 F.Supp. 361 (N.D. Ill. 1979), *aff'd without op.*, 618 F.2d 110 (7th Cir. 1980); *Garvin v. American Tel. & Tel. Co.*, 174 F.3d 1087, 1095 (10th Cir. 1999); *Hickey v. Digital Equipment Corp.*, 43 F.3d 941, 947-48 (4th Cir. 1995); *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1275-76 (10th Cir. 1994); *Schroeder v. Phillips Petroleum Co.*,

17 F.3d 1147, 1148 (8th Cir. 1994); *Fuller v. FMC Corp.*, 4 F.3d 255, 259 (4th Cir. 1993); *Allen v. Adage, Inc.*, 967 F.2d 695, 701-03 (1st Cir. 1992); *Bradwell v. GAF Corp.*, 954 F.2d 798, 800 (2d Cir. 1992); *Rowe v. Allied Chemical Hourly Employees' Pension Plan*, 915 F.2d 266, 269 (6th Cir. 1990); *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541, 545-46 (8th Cir. 1989); *Arnold v. Babcock & Wilcox Co.*, 525 N.E.2d 59, 62 (Ill. 1988).

The district court concluded that "the undisputed evidence establishes that there was not a reduction in force." A11. Petitioners challenge this finding based on their false allegation that Respondent made statements that the term "reduction in force" means "multiple terminations." Respondent made no such statements, however.

## III. Petitioners' contention that the district court erroneously concluded that the term "reduction in force" is unambiguous so that extrinsic evidence could not be considered to interpret the meaning of the term is irrelevant and is not a sufficient ground for granting a writ of certiorari, but, in any event, the district court's conclusion was correct.

The third question presented in the petition is: "Whether the district court erred in finding that the term 'reduction in force' (as used in Xtra's 1993 employee policy manual) was unambiguous so that extrinsic evidence would not be used to interpret its meaning?" At best, the alleged error consists of an erroneous factual finding or the misapplication of a properly stated rule of law. Under Rule 10, a petition for a writ of

certiorari is rarely granted in such circumstances. As apparent from the question, the question is not of general importance but is unique to the facts of the present case. It is not a sufficient ground for granting a writ of certiorari.

Moreover, the alleged error is irrelevant. In affirming the summary judgment in favor of Respondent, the court of appeals did not reach the issue of whether the term "reduction in force" is unambiguous or ambiguous because, it concluded: "The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise." A28. Regardless of whether the term "reduction in force" is unambiguous or ambiguous, Petitioners are not entitled to severance benefits because Respondent's 1993 Handbook does not promise severance pay to workers who were terminated.

In any event, the district court correctly concluded that the term "reduction in force" is not ambiguous. A10. As the district court noted, Petitioners themselves "conceded at the hearing [on the summary judgment motions] that the term 'reduction in force' in the policies manual is not ambiguous." A9-10.

## IV. Petitioners' contention that the court of appeals erred in not finding an obligation by Respondent to pay severance benefits based on Petitioners' (untrue) allegations that Respondent admitted that it had a severance benefits program is not a sufficient ground for granting a writ of certiorari.

The fourth question presented in the petition is:

> Whether the Appellate Court erred in finding that Xtra did not have an ongoing obligation to pay severance benefits to plaintiffs based solely upon the 1993 employee policy manual, which states that "the Company will develop and implement an appropriate separation program if business and economic conditions necessitate a reduction in force", when the facts have shown that: (1) Xtra's officers admitted that an ongoing program existed and Xtra implemented a program of payments of severance benefits to employees in the past and for the one employee not hired by the outsourcing company, (2) Xtra admitted that it did not change its program before the plaintiffs were terminated and (3) Xtra distributed a written memorandum evidencing their [sic] severance benefit program?

At best, the alleged error consists of an erroneous factual finding or the misapplication of a properly stated rule of law. Under Rule 10, a petition for a writ of certiorari is rarely granted in such circumstances. As

apparent from the question, the question is not of general importance but is unique to the facts of the present case. It is not a sufficient ground for granting a writ of certiorari.

Moreover, Petitioners' allegation as to what "the facts have shown" is false. Respondent's officers never admitted that "an ongoing program existed" or that Respondent had "implemented a program of payments of severance benefits to employees." The court of appeals considered and correctly rejected Petitioners' allegation:

> The company's statements were not, as the plaintiff claims, "admissions" that "there was a severance benefit plan." They were merely descriptions of an acknowledged practice.... [T]he plaintiff in this case wants to use the employer's practices of paying severance pay not to explicate a contract but to create one; and a practice does not create an obligation under the principles of contract law (the principles normally and here applicable to teasing out the obligations created by a pension or welfare plan governed by ERISA) unless it creates a contract "implied in fact."

A32. The court of appeals found that Respondent's practice—which is to pay severance benefits to employees who, unlike Petitioners, are laid off in a reduction in force if Respondent did not contract for comparable jobs for them at their current work locations—did not create a contractual obligation to pay severance benefits. A32-34.

## V. Petitioners' contention that a "reduction in force" occurred such that Respondent is required to pay severance benefits to Petitioners is not a sufficient ground for granting a writ of certiorari, but, in any event, the district court and the court of appeals' conclusion that a "reduction in force" means a layoff and did not occur here has been uniformly reached by numerous other courts.

The fifth question presented in the petition is: "Is Xtra required to pay severance benefits only when a 'reduction in force' occurs, and, if so, did a 'reduction in force' occur with Xtra's multiple terminations of plaintiffs so that severance benefits were owed to Brines and the certified class." This question does not present any general issue of law worthy of consideration by this Court. It essentially repeats the second question presented and, like the second question presented, is not a sufficient ground for granting a writ of certiorari.

Moreover, the fifth question presented is irrelevant. The court of appeals concluded: "The 1993 plan did not promise severance pay to workers who were terminated, whether because of a reduction in force or otherwise." A28. Even if Petitioners' contention that a "reduction in force" occurred were correct, which it is not, Petitioners would still not be entitled to severance benefits because Respondent's 1993 Handbook does not promise severance pay to workers who were terminated.

In any event, for the reasons discussed above in Section II, no "reduction in force" occurred in the present case because, as the district court concluded,

"[n]o reduction in force occurs when an employer transfers its operations to another entity but immediately hires the former employees on comparable terms and the former employees are never unemployed as a result of the transfer," A10-11, and, as the court of appeals likewise concluded, "reduction in force" "is a term used to describe a mass layoff, rather than the sale of a whole or part of a business," A28 (citations omitted).

## VI. Petitioners' contention that Respondent had an ongoing severance benefit program or practice such that Respondent is required to pay severance benefits to Petitioners is not a sufficient ground for granting a writ of certiorari, but, in any event, is based on false allegations and was correctly considered and rejected by the court of appeals.

The sixth question presented in the petition is: "Did Xtra's unrevoked, ongoing severance benefit program or practice create obligations of payments to Brines and the certified class, if their [sic] program or practice did not contradict the terms of any written plan?" This question does not present any general issue of law worthy of consideration by this Court. As apparent from the question, the question is not of general importance but is unique to the facts of the present case. It essentially repeats the fourth question presented and, like the fourth question presented, is not a sufficient ground for granting a writ of certiorari.

This question falsely assumes that Respondent has an "unrevoked, ongoing severance benefit program." The court of appeals correctly found that there is no

such "program" and that under well-settled law with which Petitioners do not take issue in their petition, Respondent's practice—which is to pay severance benefits to employees who, unlike Petitioners, are laid off in a reduction in force if Respondent did not contract for comparable jobs for them at their current work locations—did not create a contractual obligation to pay severance benefits. A32-34.

**VII. Petitioners' contention that the "Apollo Memorandum" was a written benefit plan such that Respondent is required to pay severance benefits to Petitioners is not a sufficient ground for granting a writ of certiorari, is so lacking in merit that neither the district court nor the court of appeals even considered it, and, in any event, is plainly wrong because the memorandum pertained only to a proposed merger in 1998 that did not go forward.**

The seventh question presented in the petition is: "Was the Apollo memorandum a written benefit plan that would obligate Xtra to pay severance benefits or, alternatively, can it be used as extrinsic evidence to define an ambiguous term?" This question does not present any general issue of law worthy of consideration by this Court. As apparent from the question, the question is not of general importance but is unique to the facts of the present case. It is not a sufficient ground for granting a writ of certiorari.

Petitioners' contention is so lacking in merit that neither the district court nor the court of appeals gave it any serious consideration. The so-called "Apollo

Memorandum" did not outline any general severance benefit program of XTRA.

In 1998, XTRA and Apollo Management and Interpool, Inc. ("Apollo") discussed a potential merger of XTRA into an entity owned by Apollo. A20; R78, XTRA Ex. I, p. 1. Ultimately, the proposed merger between XTRA and Apollo did not go forward. A21.

On July 14, 1998, Lewis Rubin, XTRA Corporation's President, sent a memorandum (the "Apollo Memorandum") to all XTRA employees, including Plaintiffs, discussing the potential merger. A20; R78. The memorandum states in the opening paragraph: "The purpose of this memorandum is to provide you with some information about employee benefits which XTRA and Apollo have agreed would apply to employees affected by the Merger. Many of you will be unaffected by this Merger but if you are affected you should know the following programs have been agreed to by Apollo and XTRA." R78, XTRA Ex. I. The Apollo Memorandum goes on to state:

> We are implementing, with the approval of Apollo a severance arrangement for all employees that are terminated as a result of the Merger at any time during the one year period commencing on the date of the Merger. The details of this severance arrangement will be forthcoming when the program is finalized and all of the terms will be set forth in a plan document. You will receive a copy of the plan document which will specify these arrangements in greater detail and will be controlling.

R78, XTRA Ex. I, pp. 1-2. The language of the memorandum itself clearly indicates that the severance arrangement discussed therein applied only to employees who were terminated as a result of the proposed merger with Apollo (thus, "affected" by the proposed merger) and that a plan document, which would contain the details of the severance arrangement, would be forthcoming. The proposed merger never materialized and, thus, there was no "plan document" as mentioned in the Apollo Memorandum.

**VIII. Petitioners' contention that the district court erroneously concluded that ERISA applied even though Petitioners are not entitled to benefits under the ERISA plan at issue is not a sufficient ground for granting a writ of certiorari, is so lacking in merit that neither the district court nor the court of appeals even considered it, and lacks any supporting legal authority.**

The eighth (and last) question presented in the petition is: "Did the district court err when it found that ERISA was applicable to Xtra's severance benefit program when it subsequently found that there were no obligations to pay severance benefits pursuant to ERISA, so that the state law claims could not be reinstated (would they still be preempted if ERISA was inapplicable)?" At best, the alleged error consists of an erroneous factual finding or the misapplication of a properly stated rule of law. Under Rule 10, a petition for a writ of certiorari is rarely granted in such circumstances. As apparent from the question, the question is not of general importance but is unique to the facts of the present case. It is not a sufficient

ground for granting a writ of certiorari. Although Petitioners presented this question to the district court and the court of appeals, both courts apparently found the question to be so lacking in merit that they did not even bother to address it in their written opinions.

Without citation to any authority, Petitioners contend that "if there was no obligation to provide benefits pursuant to the written plan and if there were no unwritten obligations, then ERISA should be inapplicable" and Petitioners' state law claims are not preempted by ERISA. Petition, p. 27. In other words, Petitioners argue that ERISA only applies and preempts their state law claims if they prevail on their ERISA claim and are entitled to severance benefits. The applicability of ERISA, however, does not depend on whether a plaintiff succeeds on the merits of his ERISA claim. *See Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 790-91 (7th Cir. 1996) (ERISA governed former employee's claim for severance benefits although former employee not entitled to severance benefits); *Kennedy v. Connecticut General Life Ins. Co.*, 924 F.2d 698, 700 (7th Cir. 1991) ("[S]ubject matter jurisdiction [under ERISA] depends on an arguable claim, not on success.").

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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